UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S DOCUMENT
Issued to: Edward T. BETHEL 596330

DECISION OF THE VICE COMMANDANT ON APPEAL
UNITED STATES COAST GUARD

2491

Edward T. BETHEL

This appeal has been taken in accordance with 46 U.S.C. 7702 and 46 CFR 5.701.

By order dated 6 May 1988, an Administrative Law Judge of the United States Coast Guard at Norfolk, Virginia, suspended outright Appellant's Merchant Mariner's License for three months, upon finding proved the charge of misconduct. In addition, Appellant's license was further suspended for six months, remitted on six months probation. The charge was supported by one specification, which was found proved.

The specification alleged that Appellant, while serving as the docking master on board the motor vessel SEA LIN, under the authority of the captioned document, did at or about 0100 on 26 April 1987, did attempt to undock the vessel while under the influence of intoxicants.

The hearing was held at Philadelphia, Pennsylvania, on 27 January 1988. Appellant appeared at the hearing and was represented by lawyer counsel. Appellant entered, in accordance with 46 CFR 5.527(a), answers of denial to the charge and specification.

The Investigating Officer introduced eight exhibits into evidence and called two witnesses.

Appellant introduced three exhibits into evidence and called five witnesses. Additionally, Appellant testified at the hearing in his own behalf.

The Administrative Law Judge admitted three exhibits identified as Judge's Exhibits.

After the hearing, the Administrative Law Judge rendered a decision in which he concluded that the charge and specification had been found proved, and entered a written order dated 6 May 1988 suspending Appellant's Merchant Mariner's License as previously set forth.

The complete Decision and Order (dated 14 April 1988 and 6 May 1988 respectively) was served on Appellant on 6 May 1988. Notice of Appeal was timely filed and considered perfected on 10 January 1989. Appellant's appeal is poperly before me for review.

FINDINGS OF FACT

At all times relevant, Appellant was the holder of Coast Guard Merchant Mariner's License No. 596330. Appellant's license authorized him to serve as an operator of uninspected towing vessels upon the inland waters of the United States not including those waters governed solely by the International Regulations for the Prevention of Collisions at Sea of 1972 (72 COLREGS). Appellant's document authorized him to serve as a grade B tankerman and all lower grades.

On 6 May 1988, the Administrative Law Judge in Norfolk, Virginia, issued a Decision & Order suspending Appellant's document outright for one month with an additional suspension for two months. This additional two month suspension was not to be effective provided no charge under 46 U.S.C. 7703, 7704, or any other navigation or vessel inspection law was proved against him for acts committed within twelve months from the date of termination of the outright suspension. A copy of this Decision & Order was sent to the Appellant by certified mail on 6 May 1988.

At or about 1930 on 5 December 1987, Appellant was serving as the operator of the towing vessel ENTERPRISE, which was pushing three loaded naphtha barges in tandem. At that time, Appellant was approaching the Conoco Clifton Ridge barge dock on the Calcasieu River, Louisiana. At or about 1935 on 5 December 1987, the lead tank barge, HOLLYWOOD 1204, being pushed by the towing vessel ENTERPRISE, operated by Appellant, allided with the fender system of the Conoco Clifton Ridge ship dock on the Calcasieu River.

The towing vessel ENTERPRISE is a 71 foot United States vessel of 1800 horsepower and 165 gross tons. It is owned by Marine Industries, Inc., 55 Waugh Drive, Norfolk, Virginia 77251.

The tank barge HOLLYWOOD 1204 is 225 feet in length and 727 gross and net tons. It has a maximum cargo weight of 274 short tons and a cargo capacity of 14,500 barrels. This tank barge was the first or lead barge in the tow navigated and maneuvered by the Appellant. It is owned by Marine Industries, Inc., 55 Waugh Drive, Norfolk, Virginia 77251. It is operated by Hollywood Marine, Inc., 55 Waugh Drive, Norfolk, Virginia 77251.

BASES OF APPEAL

Appellant raises the following issue on appeal:

(1) Whether the Administrative Law Judge clearly erred when he applied a burden of proof which was less than a preponderance of the evidence.

Appearance by: Jeffrey Moller, Esq.
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OPINION

Because of the subsequent disposition of this case, it is unnecessary to discuss the merits of Appellant's basis for his petition.

Upon review of the record, I find that the Coast Guard did not have jurisdiction over the Appellant. Under the provisions of 46 U.S.C. 7703, a license or merchant mariner's document may be suspended or revoked only if the individual was acting under the authority of his license, certificate or document when the chargeable action occurred. The term "acting under authority of license, certificate or document" is defined in 46 C.F.R. 5.57 as:

> (a) A person employed in the service of a vessel is considered to be acting under the authority of a license, certificate or document when the holding of such license, certificate or document is:
> (1) Required by law or regulation; or

(2) Required by an employer as a condition for employment...

In this case, the Appellat was charged with wrongfully controlling a coastwise engaged vessel without holding a federal pilot license for those waters as required in 46 U.S.C. 8502. Appellant did not hold the required pilot license and consequently violated the statute. However, there is no evidence in the record that any license or license endorsement held at the time by Appellant was in fact required by his employer as a condition for employment as a "docking master." In fact, the Administrative Law Judge specifically stated in his Decision:

> [T]he Investigating Officer does not claim that the holding of a Federal pilot license here was required as a condition of Captain Patton's employment...Rather, he asserts that the express language of the statute, as a matter of law, requires that one who directs and controls a coastwise vessel not sailing on register under these circumstances hold a Federal pilot license.

Administrative Law Judge Decision and Order dated 20 May 1988, p.27. The Administrative Law Judge misses the point that not only was there no evidence that a Federal pilot license was required as a condition of employment, but there was no evidence introduced to indicate that any merchant mariner license or document held by the Appellant was required as a condition of employment. Absent such evidence, there is no basis for jurisdiction.

CONCLUSION

Appellant was not holding a pilot license or endorsement on the date in issue for the waters in which the alleged misconduct arose. There is no evidence in the record that indicates that any merchant mariner license or document held by the Appellant was required as a condition of employment as "docking master." There is no jurisdiction over Appellant as defined in 46 U.S.C. 7703 and 46 C.F.R. 5.57.

ORDER

The Order of the Administrative Law Judge dated at Norfolk, Virginia, on 10 June 1988 is VACATED. The charge and specification are DISMISSED.

CLYDE T. LUSK
Vice Admiral, U.S. Coast Guard
Vice Commandant

Signed at Washington D.C. on this 15th day of December, 1989.

contentions on appeal. Only one will be addressed, because it is dispositive. Appellant argues that the Administrative Law Judge clearly erred when he applied a burden of proof whih was less than a preponderance of the evidence. I agree. In his Decision & Order of 6 May 1988, the Administrative Law Judge cites Appeal Decision 2284 (BRAHN) for the proposition that the burden of proof in suspension and revocation proceedings is less than a preponderance of the evidence.

With regard to the proper standard of proof to apply in suspension and revocation proceedings, Appeal Decision 2284 (BRAHN) was reversed by Appeal Decision 2468 (LEWIN). LEWIN, supra, conformed Coast Guard suspension and revocation proceedings with the Supreme Court holding in Steadman v. SEC, 450 US 91, 67 L. Ed. 2d 69, 101 S. Ct. 999 (1981). In Steadman, supra, the Supreme Court concluded that the preponderance of evidence standard of proof shall be applied in administrative hearings governed by the Administrative Procedure Act, 5 U.S.C. 556(d).

Accordingly, the Investigating Officer must prove the charges and specifications by a preponderance of the evidence. Congress has specifically made the provisions of the Administrative Procedure Act, including 5 U.S.C. 556(d), applicable to suspension and revocation proceedings. See 46 U.S.C. 7702. In reviewing the language in 5 U.S.C. 556(d) and the legislative history of the Administrative Procedure Act, the Supreme Court, in Steadman, supra, found that it was the intent of Congress to establish a preponderance standard in administrative hearings to ensure due process.

The proper standard of proof for a hearing convened pursuant to 46 U.S.C. 7703 is set forthat 46 CFR 5.63:

"In proceedings conducted pursuant to this part, findings must be supported by and in accordance with the reliable, probative, and

substantial evidence. By this is meant evidence of such probative value as a reasonable, prudent and responsible person is accustomed to rely upon when making decisions in important matters."

This regulation was revised in 1985 to reflect the holding in Steadman, and tracks the language of 5 U.S.C. 556(d). The ration ale concerning the standard of proof as set forth in Appeal Decision 2284 (BRAHN) was based on the language of the predecessor of 46 CFR 5.63 (46 CFR 5.20-95(b)). See Appeal Decision 2468 (LEWIN); Appeal Decision 2477 (TOMBARI); Appeal Decision 2472 (GARDNER); Appeal Decision 2474 (CARMIENKE); see also, Bender v. Clark, 744 F.2d 1424 (10th Cir. 1984); Sea Island Broadcasting Corp. v. Federal Communications Commission, 627 F.2d 240 (App. D.C. 1980).

Since the Administrative Law Judge applied a standard of proof that was less than a preponderance of the evidence, the Decision & Order must be reversed. (Decision & Order at pp. 25, 33, 34).

CONCLUSION

The Administrative Law Judge stated in his decision essentially that the substantial evidence standard, which he used in the proceeding, constituted a lesser burden of proof than the preonderance of evidence standard. Consequently, the Administrative Law Judge misinterpreted the proper standard of proof and in fact applied an erroneous standard of proof. This constitutes plain error. The proper disposition is dismissal without prejudice to refile.

ORDER

The Decision & Order of the Administrative Law Judge dated at Norfolk, Virginia, on 6 May 1988, is VACATED, the findings are SET ASIDE, and the charge and specifications are DISMISSED WITHOUT PREJUDICE to refile.

Signed at Washington, D.C. this day of , l989.

3. HEARING PROCEDURE

.96 Standard of Proof

substantial evidence denotes a certain quantity of evidence, equivalent to a preponderance of the evidence standard.

CITATIONS

Appeal Decisions Cited: 2417 (YOUNG), 2346 (WILLAMS), 2468 (LEWIN), 2474 (CARMIENKE), 2477 (TOMBARI).

Federal Cases Cited: Steadman v. Securities & Exchange Commission, 450 U.S. 91, 101 S. Ct. 999 (1981); Bender v. Clark, 744 F.2d 1424 (10th Cir. 1984); Sea Island Broadcasting Corp. v. F.C.C., 627 F. 2d 240 (App. D.C. 1980),

Regulations Cited: 46 CFR 5.541.

Statute Cited: 5 U.S.C. 556(d)

Vice-Commandant

Chief Counsel

Edward T. BETHEL, Appeal from Suspension of Merchant Mariner's License and Document

1. On 6 May 1988, Appellant's merchant mariner's license and document were suspended outright for one month upon finding proved a charge of misconduct. The charge was supported by two specifications.

2. The first specification alleged that Appellant, while serving as the operator on board the motor vessel ENTERPRISE, under the authority of the captioned documents, at or about 1930 on 5 December 1987, did wrongfully fail to properly asess the effect of the tidal current on his vessel and tow, while attempting to dock port side to the Conoco Clifton Ridge Barge Dock, resulting in an allision with the ship dock fender system at Conoco Clifton Ridge Terminal on the Calcasieu River in Louisiana. The second specification alleged that Appellant, during the same incident, failed to properly arrange his tow for docking at the Conoco Terminal, resulting in an allision with the ship dock fender system.

3. Appellant asserts three bases of appeal, however, the determinative issue is that the Administrative Law Judge applied the

wrong standard of proof in the proceeding. The

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3. (cont'd) regulation governing the standard of proof in S&R proceedings (46 C.F.R. 5.63) was modified to track with the language of 5 U.S.C. 556(d) and the holding in Steadman v. S.E.C., 450 U.S. 91 (1981). That case in essence adopted the preponderance of the evidence standard in administrative proceedings and equated "substantial evidence" with the preponderance standard. Consequently, the correct standard to be applied in S&R proceedings is the preponderance standard.

4. The Administrative Law Judge, in his Decision & Order, cited to a previous Commandant's Decision that stated the proper standard to be applied was something less than the preponderance of the evidence standrd. Based on the reference to this case, which has been since reversed on this point, the reasonable presumption is that the Administrative Law Judge applied the incorrect standard in his decision.

5. A review of the record indicates that the charge may reasonably be found proved. The position taken by the Investigating Officer appears to be "substantially justified" which would preclude reimbursement in the event Appellant files a claim under the Equal Access to Justice Act for attorney fees and other costs related to the hearing.

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6. A remand for a new hearing is available in resolving this matter. However, Appellant has already served his suspension. Additionally, the cost and logistics of convening a new hearing are practical considerations. Consequently, the proper disposition is DISMISSAL WITHOUT PREJUDICE TO REFILE rather than a remand for rehearing. This disposition enables the cognizant Marine Safety Office to evaluate all of the circumstances, including the suspension that Appellant has already served, and determine if the case should be reopened. A remand for rehearing, on the other hand, would compel a rehearing, regardless of the other factors cited. Should you concur, I have prepared a draft accordingly to take such action.

7. The Chief Administrative Law Judge concurs in this recommendation to dismiss the decision of the ALJ without prejudice torefile.

(G-LMI)
202-267-1527

16722/Bethel

Jeffrey Moller, Esq.
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Dear Mr. Moller:

The Vice-Commandant has considered your appeal of the Administrative Law Judge's Decision & Order (dated 14 April 1988 and 6 May 1988 respectively) on behalf of your client, Edward T. BETHEL. Enclosed is a copy of the Vice-Commandant's decision.

Sincerely,

JONATHAN COLLOM
Captain, U.S. Coast Guard
Chief, Maritime &
International Law Division
By direction of the Commandant

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CG MSO PHIL#** Prev. block could not be parsed for attributes -- Contact Shaffstall Support **#

***** END OF DECISION NO. 2491 *****